Nos. 04-1244 & 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER OPERATION RESCUE

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ABBREVIATIONS KEY

App.	Appendix
Br.	Brief
DX	Defense Exhibit
FACE	Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248)
NOW	Respondents National Organization for Women, Inc., et al.
Opp.	Brief in Opposition
OR	Petitioner Operation Rescue (No. 04-1352)
PA	Plaintiffs' Appendix in the Seventh Circuit
Pet.	Petition for Writ of Certiorari
Pet'r	Petitioner
RA	Appendix to OR's Reply to Brief in Opposition in *Scheidler II* (No. 01-1119)
RICO	Racketeer Influenced and Corrupt Organizations Act
Sch.	Petitioners Joseph Scheidler, *et al.* (No. 04-1244)
SSA	Scheidler Defendants' Supplemental Appendix in the Seventh Circuit

Tr.	Transcript of Trial

INTRODUCTION

Currently before the Court in this case are three pure questions of law.

First, did the Seventh Circuit fail to comply with this Court's mandate in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003) (*Scheidler II*)? As petitioners have demonstrated, and as respondents now concede, the Seventh Circuit's decision below rests upon the proposition that this Court's holding in *Scheidler II*, that respondents' lawsuit failed on all counts, was a "mistake."

Second, does the Hobbs Act proscribe "violence" that has no connection to robbery or extortion? As petitioners and the United States have demonstrated, the text and history of the Hobbs Act, the longstanding enforcement position of the federal government, the rule of lenity, and federalism concerns all preclude respondents' argument that the Hobbs Act prohibits violence wholly unconnected to robbery or extortion. Indeed, respondents' argument before the Court depends upon the wildly implausible proposition that *any activity affecting commerce* is a federal felony -- a "violation of this section" -- under the Hobbs Act.

Third, does RICO authorize injunctive relief for private parties? As petitioners and the United States have demonstrated, the text and history of RICO preclude any authorization of private injunctive relief under RICO.

Each of these issues provides an independent basis for reversal. Respondents NOW *et al*. (hereinafter "NOW") have provided no persuasive contrary argument on *any* of these issues, much less *all* of them. Moreover, reversal on *any* of these grounds requires final judgment on the merits for petitioners. NOW has offered no basis whatsoever for prolonging this litigation any longer.

RESPONSE TO NOW'S STATEMENT

The three issues currently before this Court are pure questions of law; hence, the trial record is largely irrelevant. NOW nevertheless devotes a substantial portion of its brief to the supposed "facts" of this case, "facts" which in reality are merely a collection of NOW's *allegations*. These allegations are not only irrelevant as a matter of *law*, they are profoundly inaccurate as a matter of *fact*.

The bulk of the evidence in this case addressed the pro-life sit-in movement of the late 1980's and early 1990's. This nationwide "rescue" movement involved thousands of people from all walks of life. Tr. 453, 1614. The movement was remarkable for its nonviolence: the jury here found only four acts *or* threats of violence against persons *or* property in over fourteen years of protests by thousands of people across the country. *See* OR Pet. App. 143a (jury verdict); *NOW v. Scheidler*, Mem. Op. & Order at 2 (N.D. Ill. Mar. 28, 2001) ("the jury heard evidence of anti-abortion protests that spanned from 1984 to 1998"). *See also* PA 103, 108, 114, 117, 128, 132, 138, 145, 150-51, 222, 332 (photos of "rescues"). A "violent" movement could never have had such drawing power or have maintained such an impressive absence of violent incidents.

A comparison with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is instructive. In *Claiborne*, there were at least *ten* violent incidents in *one county* of Mississippi over a *seven-year* period. *Id*. at 888, 893, 898, 904-06, 920. In the present case, the jury found only *four* acts or threats of violence in the context of *nationwide* demonstrations over a *fourteen-year* period. This Court described the violent acts in *Claiborne* as "isolated," 458 U.S. at 924, and "relatively few," *id.* at 933. *A fortiori*, the same is true here.

While NOW refers to "121 RICO predicate acts," *e.g.,* NOW Br. at 1, 4, 9, this inflated figure reflects quintuple counting. OR Br. at 3 n.5. As NOW has conceded, the jury actually found only 25 nonviolent sit-ins[1] and four unidentified acts or

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[1]NOW invokes Question 6 on the verdict form, OR Pet. App. 144a, as proving that none of the predicate acts were "peaceful" sit-ins. NOW Br. at 4. NOW is mistaken. Question 6 on the jury verdict form asked whether the jury's findings of predicate extortion under the Hobbs Act or state law were "based solely on blockades of clinic doors or sit-ins within clinics, without more." OR Pet. App. 144a (#6). In closing arguments to the jury,

NOW argued that the phrase "without more" meant that the sit-ins "didn't keep anybody out." Tr. 4987. In other words, unless the sit-in participants always moved aside to let people "freely walk in," NOW argued the jury must answer the question "no." Tr. 4987-88. *See also* Tr. 5008 (quoted in OR Reply App. in *Scheidler II* at 27). Consequently, this question became the meaningless one, "If you found extortion, was it based solely on a blockade or sit-in where participants stepped aside for anyone coming or going?" The jury's negative answer to this question thus did not indicate a finding that sit-ins were violent. In NOW's view, *no* sit-in is peaceful unless the participants "part like the Red Sea" whenever anyone wishes to pass. Tr. 5008 (closing argument). *See also infra* note 8.

NOW refers repeatedly in its brief to "blitzes." NOW did the same in its merits brief in *Scheidler II*. Tellingly, NOW used the term only once in its Seventh Circuit brief in the appeal that led to *Scheidler II*. This new terminology is perhaps designed to conjure up an image of charging linebackers. However, a "blitz" is *not* synonymous with such a charge, or even with a rescue sit-in. *See* J. Scheidler, *Closed: 99 Ways to Stop*

threats of violence to any person or property. NOW Br. in *Scheidler II* at 3 & n.4, 35 & n.45. *See* OR Br. at 3 & n.5; OR Pet. App. 143a-144a.

NOW tries to paint pro-life rescuers as thugs and ruffians. NOW Br. at 2-6. But petitioners explicitly embraced nonviolence for their efforts; indeed, OR went so far as to require a pledge of nonviolence for participants. *See, e.g.,* Tr. 1332, 1357-59, 2468, 2470; PA 120, PA 168, PA 219. *See also* Tr. 982, 1263, 1265, 1271, 1815, 1971, 2262-63, 2378-79 (embrace of nonviolence). NOW's caricature of petitioners bears scant resemblance to reality or to the record in this case, but rather represents an inflated portrayal of one side's testimony about isolated alleged incidents.

Abortion, Ch. 57, "Conduct a Blitz" (revised ed. 1993), pp. 231-33 (DX-2) (a "blitz" is a brief visit to a clinic waiting room to converse and distribute literature).

Importantly, NOW relies on contested *evidence, not findings.* NOW's allegations of violence were vigorously disputed at trial, and the jury plainly disbelieved most (possibly all) of NOW's more inflammatory factual allegations, *see* OR Br. at 3.[2] Indeed, it is mathematically impossible that the jury agreed with NOW's litany of allegations, the number of which far exceeds the four acts or threats of violence which the jury actually found. Moreover, the jury, over defendants' objection, was not required to specify what unlawful acts it found. Tr. 4495-98. There is thus *no basis* for crediting NOW's speculation as to the evidence underlying the verdict. As the district court frankly acknowledged, "the jury did not state which defendants did these acts or when they occurred, only the total number of acts. . . . [Hence,] the court does not know which evidence the jury relied upon in its findings." OR Pet.

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[2]NOW prominently features one anonymous witness's claim that she was beaten by protesters at a Los Angeles demonstration. NOW Br. at 3. This witness's testimony was almost certainly fabricated and perjurious. *See* Tr. 1527, 1530-31; SSA at 1348-1409. *See also* Corrected Reply Brief for Defendant-Appellant Operation Rescue, *NOW v. Scheidler*, Nos. 99-3076 *et al*. (7th Cir. May 10, 2000), p. 5 & n.1, Addendum at 1a-8a. Indeed, there was not a shred of testimony or evidence corroborating this anonymous witness's allegations of assault, despite the presence of crowds, numerous police, and media. Tr. 1342-44, 2941, 4642-46, 4695-99. *See also* SSA at 1364-92, 1406-08 (news coverage of the event).

NOW claims that employees were "crushed," NOW Br. at 3, but this is quite false as well. Indeed, the opposite was true: abortion facility agents physically abused the nonviolent sit-in participants. *See generally* Appendix in Support of Defendants' Motions to Dissolve the Injunction and Reopen the Court's Judgment under Fed. Civil Rules 60(b)(5)-(6), Vol. II, Tabs 18-29 (Dkt. 1462) (including declarations, photographs, and two videotapes of the "rescue" in question). (The petitioners' Rule 60(b) motions were denied on grounds of timeliness and materiality. No court has rejected, and NOW has never refuted, petitioners' evidence that the challenged testimony was either mistaken or downright fabricated.)

App. 76a-77a.

Finally, *none* of the petitioners was alleged to have committed the scattered incidents of physical abuse NOW recites, NOW Br. at 2-4. Rather, nameless "PLAN members" -- NOW's code for any pro-life activist -- allegedly did it. *Id*. The notion that protest leaders should be held liable as felons and racketeers for incidents such as one woman's grabbing another person around the neck at one location during a large-scale demonstration, RA 6-10, or one man elbowing a policeman during a sit-in, RA 11-17, is astonishing. NOW's reliance on such incidents, NOW Br. at 2 ("choked" and "elbowed"), despite their manifest insufficiency -- and unconstitutionality[3] -- as a basis for imposing associational liability, is quite telling.

ARGUMENT

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[3]The First Amendment does not tolerate imposing damages and injunctions against activists in a social movement, even leaders, merely because of what someone else supposedly did, especially where -- as here -- those misdeeds ran *contrary* to the leadership's directives. *Claiborne*, 458 U.S. at 925.

I. THIS COURT IN *SCHEIDLER II* DISPOSED OF *ALL* OF THE ALLEGED PREDICATE ACTS.

The Seventh Circuit disregarded this Court's opinion and mandate in *Scheidler II*. OR Br. at 8-11.

NOW concedes that the decision below rests upon the proposition that this Court "was mistaken" in its disposition of *Scheidler II*. NOW Br. at 15. NOW nevertheless insists, *id.*, that this Court "[q]uite clearly" goofed when it held that "*all* of the predicate acts supporting the jury's finding must be reversed," *Scheidler II*, 537 U.S. at 411 (OR Pet. App. 48a) (emphasis added).[4] According to NOW, this Court's ruling in *Scheidler II* that there was no predicate extortion in this case "still left four counts based on violence and threats of violence unresolved." NOW Br. at 15.

NOW's argument begs the question whether the Hobbs Act prohibits violence unconnected to extortion. If there is no such crime in the first place, then necessarily there can be no predicates, based on such a nonexistent offense, left in this

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[4]NOW tries to mitigate its position by purporting to find fault only with a "single sentence" in *Scheidler II*. NOW Br. at 15. Yet NOW necessarily must reject not just that one sentence, but also this Court's description of its holding in *Scheidler II* at both the beginning and the end of its opinion, *see* OR Pet. App. 33a, 48a, as well as this Court's conclusion that it "need not" address the remaining question whether RICO authorizes private injunctive relief, *see* OR Br. at 9-10.

case. Thus, NOW's challenge to *Scheidler II* founders on the meritlessness of its underlying legal theory regarding the four supposedly remaining predicate claims. *See* OR Br. § II (Hobbs Act does not prohibit violence unconnected to extortion or robbery); *Scheidler* Br. § II (same); U.S. Br. § I (same); Br. of States of Alabama *et al*. (same).

NOW's argument also depends upon another, independently essential but no less mistaken premise: that neither the four "violence" predicates, nor the "violence alone" theory of the Hobbs Act, was before this Court in *Scheidler II*. *See* NOW Br. at 13 ("No issue was presented concerning whether the Hobbs Act prohibits physical violence or threats of physical violence apart from extortion or robbery"); *id*. at 15 ("all of the predicate acts supporting the jury's verdict had *not* been addressed by the Court") (emphasis in original). NOW is simply wrong. The four "violence" predicates, as part of the ensemble of predicate acts supporting the RICO judgment, were squarely before this Court in *Scheidler II*. *See* OR Br. at 11 n.8; *infra* pp. 7-9. In addition, the viability of NOW's "violence alone" theory was before this Court both *explicitly* (at the certiorari stage) and *implicitly* (at the merits stage) in *Scheidler II*.

A. NOW's "Violence Alone" Theory was Expressly at Issue at the Certiorari Stage in *Scheidler II*.

NOW unsuccessfully raised the "violence alone" theory under the Hobbs Act at the certiorari stage in *Scheidler II*.

When seeking this Court's review in *Scheidler II*, OR had explained that in this litigation "[t]he *only* predicate offenses under RICO at issue were *extortion* under the federal Hobbs Act, . . . *extortion* under state law, and *extortion* under the federal Travel Act . . . ." OR 01-1119 Pet. at 4 n.6 (emphasis added). OR challenged *all* of these predicates. *See id.* at 19-23 (Hobbs Act), 23-26 (state extortion), 26 n.27 (Travel Act).

In opposing certiorari in *Scheidler II*, NOW falsely asserted that OR was not challenging either the Travel Act predicates or the four violations of the Hobbs Act through acts or threats of physical violence. 01-1118 & 01-1119 Opp. at 5 & n.4; *id.* at 7; *id.* at 15. NOW claimed that these supposedly unchallenged predicates were "independently sufficient to sustain liability." *Id.* at 15.

In reply, OR reaffirmed that each and every alleged RICO predicate in this case was a species of extortion, and that OR challenged all of them. OR 01-1119 Reply to Br. in Opp. at 7 & n.13. OR specifically noted that for "physical violence" to violate the Hobbs Act, such violence had to be in furtherance of a plan or purpose to commit extortion or robbery. *Id.* at 7 n.13 (citing *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999)).

This Court granted review. OR Pet. App. 138a.

B. NOW's "Violence Alone" Theory was Implicitly at Issue -- and Abandoned by NOW -- at the Merits Stage in *Scheidler II*.

At the merits stage, all the parties agreed that *every* alleged predicate act, including the four "violence" predicates, required a showing of *extortion*.

In its opening brief on the merits in *Scheidler II*, OR reiterated that NOW's RICO predicates were *extortion* claims, 01-1118 & 01-1119 Br. for Pet'r OR at 4, 25-26. OR specifically argued that rejection of NOW's theory of extortion would doom *all* of NOW's RICO predicates, *id.* at 49-50, and that "[a]ccordingly" OR was entitled to judgment in its favor "on all counts" and "on all claims." *Id.* at 50.

NOW devoted three full pages of argument in *Scheidler II* in response to OR's contention that rejection of NOW's theory of extortion under the Hobbs Act would defeat NOW's entire case. 01-1118 & 01-1119 Br. of Respondents at 33-36. Tellingly, NOW did *not* claim that *any* of the RICO predicates could survive apart from a showing of extortion. *Id.* Instead, NOW relied exclusively upon the argument that its *state* law extortion predicates independently supported the judgment. *Id.* at 11, 33-36. Indeed, as OR has noted in its opening brief in the present case, OR Br. at 11 n.8, NOW conceded in *Scheidler II* that *all* of its RICO predicates were species of extortion.

* * *

Given this litigation history, NOW's contention that the Court did not consider or rule upon four of the RICO predicate acts cannot be taken seriously. As demonstrated above, OR had met NOW's "violence alone" theory both explicitly in its reply in support of certiorari and implicitly in its opening merits brief. When NOW abandoned the "violence alone" argument in its own merits briefs, neither OR nor this Court

had any obligation to rebut an argument NOW was no longer making. Moreover, the parties' briefing in *Scheidler II*, summarized above, undisputably rendered the *entire* case ripe for disposition on the merits. This Court therefore was not "mistaken" when it properly disposed of *all* of the RICO predicate acts.

NOW protests that as the party that prevailed below, it should not have to raise every possible alternative grounds for affirmance. NOW Br. at 18. That may be true in general. But here, NOW *had* raised the supposed distinctness of the four "violence" predicates in its opposition to certiorari. When OR explicitly argued in its opening merits brief that rejecting NOW's *extortion* theory would entitle OR to final judgment in OR's favor on *all* claims, NOW omitted at its peril any counter-argument asserting supposedly nonextortionate predicates. NOW made a calculated decision to respond to OR's argument *only* by invoking NOW's state extortion claims, and not the "violence alone" theory or the four "violence" predicates.

In sum, this Court in *Scheidler II* properly disposed of *all* of the RICO predicates, rejecting each of the claims NOW saw fit to offer in support of the lower court's decision. This Court was not "mistaken" just because it did not in so many words address an argument NOW itself had raised and then abandoned.

II. THE HOBBS ACT DOES NOT PROHIBIT VIOLENCE UNCONNECTED TO ROBBERY OR EXTORTION.

The Hobbs Act, 18 U.S.C. § 1951(a), prohibits "obstruct[ing], delay[ing], or affect[ing] commerce" by "robbery or extortion" (or attempts or conspiracies so to do) or by "violence . . . in furtherance of a plan or purpose to do

anything in violation of this section." *Id.* Plainly, violence alone does not constitute a crime under the Hobbs Act. OR Br. § II; Sch Br. § II; U.S. Br. § I. Rather, the violence must be "in furtherance of a plan or purpose to do *anything in violation of this section*." A "violation of this section," in turn, refers back to the ban on robbery or extortion that affects commerce. Hence, the notion that the Hobbs Act proscribes violence wholly unconnected to robbery or extortion is patently untenable on the face of the statute. *See* OR Br. § II(A).

NOW argues that the phrase "violation of this section" in the Hobbs Act means "obstructing, delaying, or affecting commerce." NOW Br. at 33 (NOW replaces "anything in violation of this section" with "obstruct, delay, or affect interstate commerce"), 34 (same). But "obstructing, delaying, or affecting commerce" is *not* a violation of the Hobbs Act. *But see* Br. of Feminist Majority Foundation at 23 (asserting that the Hobbs Act's "primary objective" is "prohibiting any action that '. . . affects commerce'"). Indeed, the proposition that "affecting commerce" is a federal felony is not only countertexual but absurd. A "violation of this section" *cannot* mean merely "affecting commerce." Therefore, NOW's entire "plain meaning" argument fails.

NOW's attempts to paper over this yawning logical gap in its argument collapse under examination.

First, NOW repeatedly misrepresents the "commerce" language of the Hobbs Act. The statutory text says "obstructs, delays, or affects commerce." 18 U.S.C. 1951(a). But since it is facially implausible to read the Hobbs Act as prohibiting merely "affecting" commerce, NOW resorts to rephrasing, substituting the terms "interfere" and "obstruct." NOW Br. at 21-22, 24, 26-27, 34, 36-37. NOW's paraphrases are seriously incomplete and misleading. The actual statutory term "affect" is far broader (and far less pejorative) than "interfere" or

"obstruct." Even if NOW's argument would read a "violation of this section" to mean "merely" that the Hobbs Act outlawed all interference with or obstruction of commerce -- whether or not violent -- this would be a profound rewriting of the Hobbs Act. Reading the Hobbs Act to proscribe merely "affecting" commerce is preposterous.

Second, NOW contends that unless the Hobbs Act is read to proscribe violence unconnected to robbery or extortion the "violence-in-furtherance" offense would be entirely duplicative of the Hobbs Act's separate prohibition of robbery and extortion. NOW reasons that this would render the violence-in-furtherance language superfluous, a result that must be avoided. NOW Br. at 23-27. Both premises of NOW's argument, however, are erroneous. In the first place, redundancy is not a valid reason for departing from the plain meaning of a statute. Legislatures are entitled to, and often do, take a belt-and-suspenders approach to a particular matter. "Any overlap . . . is beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct." *Pasquantino v. United States*, 125 S. Ct. 1766, 1773 n.4 (2005). Indeed, the Hobbs Act itself has redundant language elsewhere (e.g., "affects" already subsumes "obstructs" and "delays" in § 1951(a); "obtaining" already subsumes "taking," and "force" already subsumes "violence," in § 1951(b)(1) & (2)). And in the second place, NOW is mistaken to see superfluity here. Violence in furtherance of a plan of extortion is *not* coextensive with extortion itself. Prior briefs have already illustrated this. *See* OR Br. at 13 n.9; U.S. Br. at 11-12. To give yet another illustration: The mobster who threatens violence and demands "insurance" payments from a business owner is guilty of attempted extortion. The mobster's subsequent acts of violence against a noncomplying owner are not additional acts of attempted extortion -- a crime

which the mobster has already committed -- or of extortion itself, but rather are violations of the violence-in-furtherance provision.

Third, NOW points to the title of the Hobbs Act. NOW Br. at 27-28. But "[t]he title of a statute cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (editing marks and citation omitted). In any event, the title of the Hobbs Act -- "Interference with commerce by threats or violence" -- is, like all titles, a shorthand reference. "Threats or violence" is simply a very abbreviated reference to robbery, extortion, and violence in furtherance thereof.

Fourth, NOW contends that if the violence must be in furtherance of robbery or extortion, Congress should have used the phrase "so to do" instead of the phrase "to do anything in violation of this section." NOW Br. at 29-30. NOW points out that Congress used the phrase "so to do" when proscribing extortionate attempts and conspiracies, *viz.*, "or attempts or conspires *so to do*," 18 U.S.C. § 1951(a) (emphasis added), but used different phrasing when proscribing violence-in-furtherance. Congress, however, is not obligated to use identical phrasing when such phrasing might create needless ambiguity or awkwardness. Had Congress chosen the language NOW insists upon, that choice would have come at the expense of clarity. NOW's hypothetical clause, "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose so to do" can easily be read to be self-referent. In other words, the clause could be read to prohibit acts or threats of violence in furtherance of a plan or purpose to commit or threaten violence. Congress wisely foreclosed any such ambiguity by employing the phrase "to do anything in violation of this section," which refers back to the *section*, not just to the violence-in-furtherance *provision*.

Fifth, NOW claims that Congress ratified the "violence alone" theory when it amended the Hobbs Act in 1994 without expressly disavowing that theory. NOW Br. at 30-31. NOW asserts that Congress "knew that the Hobbs Act was being used against violence and threats of violence, apart from extortion and robbery." *Id*. at 31. However, NOW offers no basis whatsoever for its premise that Congress was aware of any such thing. To the contrary, the United States by 1994 had already long been of the view that the Hobbs Act only proscribes violence when linked to robbery or extortion, *see* U.S. Br. at 18-19, and the only reported decision as of 1994 expressly rejected the "violence alone" theory, *see United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975). Thus, to the extent Congress was ratifying anything, it was the *opposite* of NOW's position.

Sixth, NOW argues that a general federal ban on violence would be useful in prosecuting hate crimes or attacks on transportation modalities. NOW Br. at 33-34. Such policy arguments are better addressed to Congress, which has the capacity to draft laws tailored to such concerns. *See*, *e.g.*, 18 U.S.C. §§ 32 (violence against aircraft or aircraft facilities), 37 (violence at international airports), 844(i) (arson and bombing of property used in interstate commerce), 1362 (destruction of communication lines, stations or systems), 1992 (wrecking trains), 1993 (violence against mass transportation systems). Twisting the current language of the Hobbs Act into a blunderbuss ban on all violence -- indeed all activity -- affecting commerce is by no means the proper response to NOW's policy suggestions.[5]

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[5]NOW also tries (NOW Br. at 11, 22) to bolster its "violence alone" argument with a line taken from one of this Court's opinions: "[The Hobbs] Act speaks in broad language, manifesting a purpose to use all of the constitutional power Congress has to punish interference with interstate

commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960). But in *Scheidler II* this Court explained that this language from *Stirone* referred to Congress's exercise of "the full extent of its commerce power," 537 U.S. at 408; the usual rules of statutory construction, such as the rule of lenity, still control the substantive scope of the offenses defined in the Hobbs Act, *id*. at 408-09. *See also United States v. Yankowski*, 184 F.3d 1071, 1074 (9th Cir. 1999) (rejecting this same argument for a "violence alone" theory: the "contention that this single statement by the Supreme Court [in *Stirone*], taken out of context, should be used by this Court to reject the clear and express provisions of the Hobbs Act is without merit").

III. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF.

The text and history of RICO's civil remedies provision, 18 U.S.C. § 1964, demonstrate overwhelmingly that RICO does not authorize private injunctive relief. OR Br. § III; Sch. Br. § III; U.S. Br. § II. Indeed, in RICO, Congress borrowed from antitrust law precisely the remedial language this Court had held *not* to authorize private injunctive relief; at the same time, Congress did *not* borrow a separate provision of antitrust law that *did* authorize private injunctions. OR Br. at 22-24; U.S. Br. at 22-26. Faced with this compelling evidence, NOW offers no persuasive arguments to the contrary.

A. NOW Ignores the Text and Structure of § 1964.

NOW ignores the plain differences between § 1964(b) -- which gives the Attorney General unqualified authority to "institute proceedings under this section" -- and § 1964(c) -- which gives a private party "injured in his business or property" the right to "sue therefor . . . and . . . recover threefold the damages he sustains . . . ." NOW flatly asserts that the distinct phraseologies of subsections (b) and (c) are "equivalent," NOW Br. at 40, but this is plainly incorrect. While § 1964(b) gives an unqualified green light to the federal government to "institute proceedings," and thus to invoke the equitable relief specified in § 1964(a), the private treble damages provision of § 1964(c) does no such thing. Rather, it sets forth a private right to sue for a particular remedy, namely, treble damages. *See* OR Br. at 19-21. The language and structure of § 1964(b) and § 1964(c) are decidedly *not* parallel. *See also* U.S. Br. at 21-22.

B. NOW Has No Persuasive Answer to the Antitrust Analogy.

NOW cannot deny that the Sherman and Clayton antitrust statutes served as the models for RICO's remedial sections. *See* OR Br. at 22. Instead, NOW takes mutually inconsistent tacks in an effort to minimize the analogy between antitrust and RICO remedies.

On the one hand, NOW denies that this Court ever held that private injunctive relief was unavailable under the Sherman Antitrust Act. Rather, NOW dismisses the pertinent decisions as turning on standing. NOW Br. at 42. This is simply inaccurate. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) ("We cannot suppose it was intended that the enforcement of the act should depend *in any degree* upon original suits in equity instituted by the states or *by individuals* to prevent violations of its provisions") (emphasis added); *Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917) ("a private person cannot maintain a suit for an injunction under § 4 . . . even if . . . special damages [are] shown"). *See also* U.S. Br. at 23 & n.4 (listing additional cases).

On the other hand, NOW admits that this Court held that private injunctive relief was unavailable under the Sherman Act, NOW Br. at 42, but credits this to language making it the government's "duty" to institute proceedings, *id.* This argument suffers from two obvious defects. First, neither *Northern Securities* nor *Paine Lumber* used any such rationale for their holdings. And second, whether the government has the *duty* (as in the antitrust statutes) or merely the *power* (as in RICO) to "institute proceedings" is wholly irrelevant to the question whether *private parties* can obtain such relief.

NOW's essential position is facially implausible. NOW identifies as "important textual differences," NOW Br. at 43,

such minutiae as use of the phrase "shall be the duty" as opposed to "may" (regarding the *government's* pursuit of equity relief), and the division *vel non* into separate subsections of provisions
conferring jurisdiction and authorizing federal government pursuit of equitable relief. *Id*. Yet NOW finds no significance in the *inclusion* of a provision granting private equitable relief in the Clayton Act and the glaring *omission* of precisely such a provision in RICO. NOW has strained at gnats and swallowed the proverbial camel.

C. NOW Has No Persuasive Response to the Legislative History.

The legislative history confirms beyond doubt that private injunctive relief is *not* available under RICO. OR Br. at 26-29. NOW has no persuasive response.

The only legislative history NOW offers in support of its position is Representative Steiger's supposed statement that "[T]he bill as it now stands. . . may have this option [of equitable relief]." NOW Br. at 45 (purporting to quote 116 Cong. Rec. 35,347 (1970)). The only reason this stray statement appears even weakly to support NOW is because of the bracketed language NOW added. In its original context, Rep. Steiger was referring to the "option," not of obtaining *injunctions*, but of obtaining "proper redress." *See* 116 Cong. Rec. 35,347 (1970). (The relevant excerpt is set forth, in context, in the appendix to this reply brief.) Rep. Steiger, in the very next sentence, said he was "convinced" that the amendment he proposed, which authorized private injunctive relief, "will have the option," *id.* This statement makes perfect sense in reference to "proper redress" (a matter of opinion one can be "convinced" of), but makes no sense in reference to injunctive relief, which his (unsuccessful) amendment

explicitly (not *arguably*) authorized. *See* 116 Cong. Rec. 35,346 (1970) (setting forth text of Steiger's proposed amendment). Moreover, NOW's reading of this isolated statement is impossible to reconcile with Rep. Steiger's own explicit public criticism of the underlying bill's *failure* to provide for private equitable relief. *See* OR Br. at 28.

D. The "Inherent Equitable Power of Courts" is Not a License to Disregard Congressional Selection of Remedies.

Recognizing the weakness of its statutory construction arguments, NOW invokes the "inherent equitable powers," NOW Br. at 12, that courts have "'absent the clearest command to the contrary from Congress,'" *id.* at 37 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1975) (brackets omitted). Indeed, NOW contends (without supporting authority) that "federal courts inherently have authority to issue injunctive relief unless a statute *expressly* eliminates this power." NOW Br. at 39 n.8 (emphasis added). This argument, however, relies on statements torn out of context.

There are at least two separate strands of remedies jurisprudence in this Court. One strand -- the strand NOW invokes -- addresses those situations where a private right of action exists either expressly (as in *Califano*, 442 U.S. at 698 n. 12 ("a party . . . may obtain a review of such a decision by a civil action") (quoting statute)) or by implication (as in *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992) (Title IX)), but no particular remedies are spelled out. The second strand -- which NOW largely ignores -- addresses those situations where, as with RICO, Congress *has* specified remedies, but a litigant wants *additional* remedies read into the statute. *See* OR Br. at 21 (listing cases). In this latter situation,

the "carefully integrated civil enforcement provisions found in . . . the statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). NOW's invocation of cases from the wrong line of authority is "inapposite," *Franklin*, 503 U.S. at 69 n.6 (distinguishing the lines of cases). In reality, NOW is simply repeating a *dissenting* argument this Court already rejected in the context of the Sherman Act. *See Paine Lumber*, 244 U.S. at 473 (Pitney, J., dissenting) ("I dissent from the view that complainants cannot maintain a suit for an injunction, and I do so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction . . . rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the [federal] courts . . .").[6]

[6]The authorization of private injunctions under RICO is not one of those "powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others," *Chambers v. NASCO, Inc.*, 501 U.S.

E. Policy Judgments are for Congress, Not Courts.

Finally, NOW suggests that policy arguments may support giving private parties equitable relief under RICO. NOW Br. at 46-48.[7]

32, 43 (1991) (internal quotation marks and citations omitted). *See also Pennsylvania Bureau of Corr. v. United States Marshal Serv.*, 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling").

[7]Belying the supposed need for an injunction here, NOW never requested a preliminary injunction despite the twelve years this case took to get to trial, and NOW has taken no enforcement action since the permanent

injunction issued. NOW has previously conceded that there is little practical need for RICO injunctions against abortion protests because "FACE provides broad relief and is simpler to navigate." Opp. in *Scheidler II* at 15.

There are weighty policy arguments *against* empowering private parties with injunctive relief under RICO as well. *See* OR Br. at 38; U.S. Br. at 27-28. *Cf. Minnesota v. Northern Sec.,* 194 U.S. at 171 (reserving injunctive relief to Attorney General ensures "uniform plan" of equitable enforcement).

The injunction in the present case perfectly illustrates the abuse that can result from private pursuit of RICO injunctions: rather than enjoining violations of RICO, *cf.* 18 U.S.C. § 1964(a), this injunction enjoins such things as trespass, vandalism, and obstruction, OR Pet. App. 99a-100a.

But the short answer is that policy considerations are for legislatures, not courts. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club,* 451 U.S. 287, 297 (1981).[8] "The debate concerning this formidable

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[8]NOW credits the injunction in this case with having had salutary effects. NOW Br. at 1-2. This assertion is without record support and is in any event quite irrelevant to the question whether injunctions are available to private parties under RICO. To the extent NOW would have this Court believe the injunction issued in 1999 in this case put a halt to the national rescue movement, the clear indications are that it was the enactment in 1994 of FACE, 18 U.S.C. § 248 -- which made nonviolent pro-life sit-ins a federal crime -- that shut down the rescue movement. *See* United States General Accounting Office, *Abortion Clinics*: *Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act* (GAO/GGD-99-2) (Nov. 1998); *1995 Clinic Violence Survey Report*, Feminist Majority Foundation, Chart 5 (reproduced at p. 9a of App. A to Amicus Brief of Feminist Majority Foundation in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065 (O.T. 1995) [FMF *Schenck* Br.]). (Indicative of the mindset of groups like NOW and FMF, the FMF report lists as "violence" not only pro-life rescues -- which it labels "blockades" or "invasions" -- but also "home picketing," FMF *Schenck* Br. at 2a, and even littering, *id.* at 7a ("disposal of trash on clinic property"). *See also* Tr. 730 (Susan Hill) ("every rescue event that has been conducted in this country in the last 15 years by Operation Rescue" has "felt violent to us"); Tr. 1268 (Maureen

power . . . should be conducted and resolved where such issues belong in our democracy: in the Congress." *Grupo Mexicano de Desarollo v. Alliance Bond Fund*, 527 U.S. 308, 329 (1999).

IV. THIS COURT SHOULD LEAVE NO DOUBT THAT THIS CASE IS OVER.

In its opening brief, OR addressed the proper disposition of this case. OR Br. at 38-39. As OR noted, the judgment of the Seventh Circuit must be reversed *and* final judgment entered for petitioners if petitioners prevail on *any* of the three questions presented here. OR emphasized that neither the Seventh Circuit nor NOW itself has identified *any* reason to protract the merits stage of this litigation any further. NOW, in its brief, has not challenged any of these propositions.

It is time for this marathon case to end.

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims. In the alternative, this Court should itself enter final judgment for petitioner on all

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Burke) ("every act of civil disobedience that would block access to an abortion clinic" is violent, even if "entirely passive, peaceful, nonresistant, silent"); Tr. 1278 (Burke) (sidewalk counseling, yelling, raising voice all violent).

claims.[9]

[9]NOW concedes that this Court has the power to take such an unusual step. NOW Br. at 16.

Respectfully submitted,

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APPENDIX

116 Cong. Rec. 35,346-47
[excerpt]

[35,346]

MR. STEIGER of Arizona . . . .

. . . It is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a [35,347] right to obtain proper redress. It is a rather simple approach and one I am sure we can all support under the bill as it now stands they may have this option. I am convinced under the language proposed by this amendment they will have the option. Really, insofar as I am concerned it is just that simple.